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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 621

JOHN R. PENNINGTON, ET AL,
Appellants,

vs.

CITY OF CORPUS CHRISTI, ET AL,
Appellees.

On Appeal From the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting at San Antonio, Texas

APPELLEES' MOTION TO DISMISS

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Appellees.

On Appeal From the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting at San Antonio, Texas

---

APPELLEES' MOTION TO DISMISS

NOW COME City of Corpus Christi, Texas, a municipal corporation, Harry A. Grim, Jack Edwards and J. S. Ray, as residents, qualified voters and property taxpayers within the area attempted to be incorporated as a separate town, Appellees, and pursuant to Rule 16 of the Rules of this Court, move to dismiss the appeal in the above styled and numbered case on the following grounds:

a) Because this appeal, not having been taken in conformity with Section 1257 (2), Title 28,

U.S.C.A., the same is not within the jurisdiction of this Court.

b) Because this appeal, not having been taken in conformity with Rule 15(d) of this Court, the same is not within the jurisdiction of this Court.

c) Because the questions now being urged before this Court were not timely raised below.

d) Because the questions now being urged before this Court were not properly raised below.

e) Because the constitutionality of Ordinance No. 6206 was not expressly passed upon by the Courts below.

f) Because the constitutionality of Ordinance 6242 was not expressly passed upon by the Courts below.

g) Because this case does not present a substantial federal question.

h) Because the Judgment in this case rests on an adequate non-federal basis.

WHEREFORE, PREMISES CONSIDERED, Appellees pray that this appeal be in all things dismissed and that Appellees be awarded their costs, and for such other and further relief as is proper.

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ATTORNEY FOR APPELLEES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

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JOHN R. PENNINGTON, ET AL,
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On Appeal From the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting at San Antonio, Texas

BRIEF IN SUPPORT OF ATTACHED, PRECEDING MOTION OF APPELLEES TO DISMISS

NOW COME City of Corpus Christi, Texas, a municipal corporation, Harry A. Grim, Jack Edwards and J. S. Ray, as residents, qualified voters and property Taxpayers within the area attempted to be incorporated as a separate town, Appellees, and submit this their Brief, pursuant to Rules 16, 35 and 39 of this Court, in support of the attached, preceding Motion to Dismiss.

Statement of the Case

This case involves a Declaratory Judgment rendered by the 117th District Court of Nueces County, Texas, on February 15, 1962. In such trial, Appellees were Plaintiffs and Appellants were Defendants. The Judgment of the Trial Court declared that certain annexation proceedings involving territory adjacent to Appellee City were valid and that proceedings brought by Appellants and others to incorporate a certain portion of the same territory as a separate town were invalid. Upon appeal to the Fourth Court of Civil Appeals of Texas by Appellants, Judgment, accompanied by a written opinion, was handed down affirming the Judgment of the Trial Court. Application for Writ of Error was made to the Supreme Court of Texas by Appellants, and that Court, without written opinion, denied such Application. This appeal, therefore, is brought from the final Judgment of the Court of Civil Appeals.

The annexation in question was decided by the qualified voters of the Appellee City after an election was called by the City Council. The majority of such voters having voted in favor of annexation, the City Council of Appellee City followed the mandatory provisions of its Charter,[1] by passing an ordinance annexing such territory to the Appellee City.[2]

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[1] Section 2(a), Article 1 of City Charter, on page 5 of Jurisdictional Statement.

[2] Ordinance No. 6242, on pages 62-70 of Jurisdictional Statement.

The Texas Constitution, in Article XI, Section 5 (the so-called Home Rule Amendment), confers on cities of over 5,000 inhabitants the power to adopt or amend their charters subject to such limitation as may be prescribed by the Texas Legislature. Article 1175-2 of the Revised Civil Statutes of Texas, recognizing the power of such cities to provide in their charters the rules for annexing additional territory lying adjacent to such cities.

The City of Corpus Christi, Texas, is a home rule city whose Charter reserves to the qualified voters the right to decide upon all major annexations.

> "Such question of annexation of any given territory may be submitted to the qualified voters of the City at any time upon the majority vote of the members of the Council. The question of annexation of any given territory may come before the Council for consideration upon either (1) the will of the Council, or (2) the written recommendation of the Zoning and Planning Commission of the City, or (3) petition signed by not less than 1,500 qualified voters of the City, or (4) petition signed by not less than 10% of the qualified voters residing in the territory proposed to be annexed."[1]

The annexation election in question was called by the Council in response to a petition signed by 10% of the qualified voters residing in the territory proposed to be annexed. The Appellants have contended that the petition was legally insufficient and

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[1] Page 5, Jurisdictional Statement. (City Charter Article 1, Section 2 (a))

hence did not completely confer jurisdiction upon the Appellee City of the territory in question. The Court of Civil Appeals held that the City Council, by ordering the election, necessarily found that the petition was legally sufficient, and in the absence of a showing of want of good faith or an abuse of discretion, that this finding is final and binding when called into question in a judicial proceeding. Further, that Court held that there was no evidence and no finding of the jury that the City Council, in calling the election for the annexation of the Flour Bluff area to the City, acted in bad faith. Basing upon this reasoning, the Court of Civil Appeals held that such petition, when presented to the City Council, was sufficient to commence legal proceedings and to preempt jurisdiction of the territory in question.

As Appellants in this case were attempting to incorporate a general law city after the petition for annexation had been filed with the City Council on January 4, 1961, Appellee City brought this suit for Declaratory Judgment to remove any doubt concerning the validity of its annexation proceedings.

I. Appellants Have Failed to Comply With Section 1257 (2) of Title 28, U.S.C.A., or With Rule 15(d) of This Court. (Germane to Grounds for Dismissal A and B).

At the outset, we charge that this appeal has been frivolously brought. Appellants' so-called "federal questions" are so weak and their position

is so indefensible as to make Appellants appeal a self-evident effort to delay rather than a good faith urging of an attack on an annexation procedure on constitutional grounds. We charge that Appellants' motion in bringing this appeal is to delay for as long as possible the conclusion of this case. Their motion filed with this Court on September 23, 1963, in which they sought an order further staying the issuance of mandate and the maintenance of the status quo, is evidence in support of our charge. Such motion, which was overruled on September 30, 1963, by Mr. Justice Stewart, explains that the Trial Court, although upholding annexation by the City of Corpus Christi, had enjoined the City from performing any municipal functions within the said territory pending the disposition of the case on appeal to the Appellate Courts of Texas.

On Page 2 of Appellants' Jurisdictional Statement, it is said that the jurisdiction of this Court rests on Section 1257 (2) of Title 28, U.S.C.A. We challenge this assertion. Section 1257 sets out the circumstances under which decisions may be reviewed by this Court. Subsection 2 of Section 1257 reads as follows:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

On Page 13 of Appellants' Jurisdiction Statement, it is said that "the federal question was presented to the Court of Civil Appeals by the Fifth

Point in Appellants' brief", and such Point is quoted as follows:

> "The attempted annexation of the territory in question was not in due process of law and violated the due process provisions of the Constitution of the United States, being the 14th Amendment, and the Court of Civil Appeals erred in not so holding."

Can it be said that Appellants' Fifth Point truly draws "in question the validity of a statute" of this State? Before answering such question, please consider if it would be possible to phrase an attack on due process in any more vague or indefinite terms. No statute is mentioned nor is any ordinance referred to. If Appellants have made this Point in good faith, and if they expected the Court of Civil Appeals to react favorably to the same, then why clothe their attack in such vague generalities?

Appellants' brief under their Fifth Point does not add one iota of clarity to their proposition. In fact, their Fifth Point has been grouped for argument with their Sixth Point, which is a similarly vague attack upon alleged want of due process under the Texas Constitution, and their "Argument and Authorities" simply alleges that, in annexing, the City of Corpus Christi has refused to follow several of its Charter provisions. Not one single authority is cited, either under the state or federal constitution.

In Texas practice, it is said:

> "The purpose of a point of error is to point out, segregate, and identify the particular ruling or action of the Trial Court which it is contended constitutes reversible error, and assignment of error which does not segregate and identify particular proceedings in the Trial Court wherein it is contended error was committed is insufficient." [1]

Aside from its vagueness, Appellants' Fifth Point does not "point out, segregate and identify any ruling or action of the Trial Court which it is contended constitutes reversible error."

In the case of *Seaboard Air Line Ry. Co. vs. Watson*, this Court struck down, as being too indefinite, an assignment of error "which merely asserts that the State Supreme Court 'erred in holding that the scope and effect of Section 7051 . . . did not in the trial of the case in the court below deprive the . . . Railway Company . . . of its property without due process of law and of the equal protection of the law as guaranteed to it' by Section 1 of the Fourteenth Amendment".

The rule and statutory provisions involved in the decision of the *Watson case* called for assignments of error which shall "set out separately and particularly each error asserted". This is, in essence, what the Texas Court of Civil Appeals said in the

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[1] Commercial Travelers Casualty Co. vs. Perry, (Civ. App. 1955, no writ Hist.) 281 S.W. 2d 130, 131.

[2] 287 U.S. 86, 53 S.Ct. 32, 77 L.Ed. 180.

case of *Commercial Travelers Casualty Co. vs. Perry*, supra.

Writing for the Court in the *Watson case*, Mr. Justice Butler observed, concerning the assignment of error before them, that "an allegation of error could scarcely be more indefinite". As an original proposition, we might be inclined to agree with Mr. Justice Butler but, under the circumstances, we feel that Appellants' Fifth Point is even more indefinite than that in the *Watson case*.

The complaining party in the *Watson case* did limit his assignment to a deprivation of property, whereas Appellants have managed not to limit themselves in any manner. Appellants' assignment is so general that a decision of Appellants to argue deprivation of life or liberty, rather than deprivation of property, would not be outside its terms.

Aside from failing to specify the manner or mode by which they were being deprived of life, liberty or property without due process under the Fourteenth Amendment, Appellants' Fifth Point also completely fails to point out any particular ruling or action of the Trial Court which it is contended constituted reversible error. Appellants do not, for example, charge that the Trial Court erred in not granting their Motion for Instructed Verdict filed upon the basis that such ordinance was unconstitutional as depriving them of life, liberty or property without due process of law. Indeed, there is nothing in the Jurisdictional Statement to show that Appellants ever sought any such action from the Trial Court.

In view of the foregoing, we submit that the Court of Civil Appeals was not called upon to decide a federal question in this case. Moreover, Ordinance No. 6206 could not be held to deprive Appellants of life, liberty or property because the same merely had the effect of calling an annexation election. Ordinance No. 6242 is not, we submit, the type of statute contemplated by Section 1257 (2) of Title 28, U.S.C.A., because the passage of the same involved a ministerial, as opposed to a legislative, act. As seen from a reading of Section 2 (a) of Article I of the Charter of the City of Corpus Christi, which is quoted on page 5 of Appellants' Jurisdictional Statement: "If a majority of such qualified voters voting at such election favor the annexation of such territory, the same shall be annexed by ordinance of the City Council; * * *." Where the annexation proposition carries, the City Council has no discretion to exercise for it is bound to pass the ordinance.

Aside from the foregoing, there is another reason, we submit, why this Court has no jurisdiction over the appeal at bar. The basis of our attack is Appellants' failure to conform to Rule 15(d) of this Court. Aside from their pleadings, which simply give them the right to offer proof, Appellants have wholly failed to "specify the stage in the proceedings in the court of first instance * * * which, and the manner in which, the federal questions sought to be reviewed were raised." In addition, they have failed to specify "the way in which they were passed upon by the Court." Appellants should, we submit, show in their Jurisdictional Statement that they moved for an instructed verdict, or for Judgment, or

for some similar action on the part of the Trial Court. At the very least, we urge, Rule 15(d) requires that they specify what exception was made by them to the Court's refusal to rule in their favor on the federal questions they seek to establish. Under Texas practice, a party is not permitted to raise for the first time on appeal his objection or exception to a Judgment or ruling of the Trial Court.[1] It was, therefore, incumbent upon Appellants to show the Court of Civil Appeals that they had made the objection or exception in the Trial Court which they expected the Court of Civil Appeals to consider. Appellants have the same burden by Rule 15(d) in this Court.

From the foregoing, we see, therefore, that Appellants have not demonstrated to this Court that it has jurisdiction over the case as is required by Rule 15(d) of this Court. Likewise, their record is silent insofar as showing that they preserved their "federal question" for presentation to the Court of Civil Appeals.

Of even greater importance than any of the foregoing is the fact that the record before this Court does not demonstrate or reflect what federal questions, if any, were presented to the highest State Court. On pages 13 and 14 of their Jurisdictional Statement, Appellants have quoted the questions presented to the Court of Civil Appeals. Also, they have brought forward in the record copies of their

[1] *Plasky vs. Gulf Insurance Company*, 160 Tex. 612, 335 S.W. 2d 581, 584 (1960).

Brief and Motion for Rehearing before the Court of Civil Appeals. Notice, however, that they simply state their conclusion on page 14 that the same questions were presented to the Supreme Court of Texas. Appellants, no doubt, consider it prudent to treat this in a general, unsubstantiated way, but such treatment, we submit, does not conform to the mandates of Rule 15(d) which call for specifications. This Court has held that it is without jurisdiction of an appeal unless "the record shows that the question of the validity under federal law of the State statute, as construed and applied, has either been presented for decision to the highest Court of the State, * * * or has in fact been decided by it, * * * and that its decision was necessary to the judgment."[1]

II. The Questions Now Attempted to Be Raised Before This Court Were Neither Timely Nor Properly Raised Below. (Germane to Grounds for Dismissal C and D).

At this point, we shall demonstrate that Appellants have not preserved any one of the four questions which they set out on pages 6 and 7 of their Jurisdictional Statement. The following discussion will show that these questions were not timely raised.

Questions Numbers 1 & 3, as an examination will reveal, really comprise the same proposition. The one question is very general and the other is some-

[1] *Wilson vs. Cook* 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 quoted from 90 L.Ed. p. 799.

what more specific, but both of them simply charge that the annexation was arbitrary, unreasonable and unjust. This same charge is contained in Appellants' Notice of Appeal to this Court and in their pleadings in the Trial Court, where it was treated as one proposition.[1] Also, it is found as one proposition in Appellants' Motion for Rehearing in the Court of Civil Appeals. The fact remains, however, that such charge was not, in any sense, contained in Appellants' Brief in the Court of Civil Appeals. Such Brief simply complains of three instances where Appellee City allegedly failed to follow its Charter provisions in connection with the annexation proceedings. The Court of Civil Appeals did not pass upon any federal question, and, we submit, it was not called upon to decide a federal question.

The foregoing demonstrates that Question Numbers 1 & 3 were not timely raised by Appellants. Certainly, as we have already shown under our jurisdictional discussion, the vague reference to the Fourteenth Amendment in Appellants' Brief before the Court of Civil Appeals does not properly raise a federal question.

When we examine Question Number 4, we find that it was contained in Appellants' Notice of Appeal to this Court as Question Number 2. With the exception of the allegation concerning the failure of the Appellee City to comply with the "laws of Texas," such charge is found in the Brief before the Court of Civil Appeals. However, such Brief

[1] Page 8 of the Jurisdictional Statement.

wholly fails to demonstrate how the alleged refusals to follow the Charter provisions in question deprived anyone, much less Appellants, of life, liberty or property under the Fourteenth Amendment to the United States Constitution. In fact, in arguing such Fifth Point in their Brief before the Court of Civil Appeals, Appellants have grouped it with a similar point charging lack of due process under the Texas Constitution, and their argument never draws any distinction between the two Constitutional provisions.

Probably the greatest fault with Question Number 4 is not concerned with its vagueness before the Court of Civil Appeals, but rather with the fact that there is no showing that a similar federal question was raised in the Trial Court. We have already seen that Appellants' pleadings, which they quote at page 8 of their Jurisdiction Statement, do not allege a failure to comply with the Charter provisions.

We see then that Appellants have not properly nor timely raised Question Number 4. The Court of Civil Appeals was not called upon to decide a federal question, because none was properly presented to it. In Texas, an appellant is deemed to have waived points of error and complaints not briefed.[1] This is the case with reference to Appellants' Fifth Point in the Court of Civil Appeals, because they have neglected to cite even one authority to support

[1] *Burgess vs. Sylvester*, 143 Tex. 25, 182 S.W. 2d 358 (1944); 4 Tex. Jur. 2d pp. 166-168 Sect. 658.

their position that there has been a want of due process under the Fourteenth Amendment.

That the Court of Civil Appeals did not decide a federal question is not challenged by Appellants.[1] This Court has held repeatedly that it cannot consider a question not raised or considered below.[2] Moreover, as we have previously pointed out, Appellants' record is absolutely devoid of a showing as to what questions were presented to the Supreme Court of Texas, the highest court of this State. This Court has always held that no Jurisdiction lies unless it affirmatively appears from the record that the federal question was actually decided by the highest state court.[3]

Concerning Question Number 2 in Appellants' Jurisdictional Statement, this can be disposed of in a summary manner. Rule 10 of this Court provides as follows:

> "Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court."

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[1] Page 26 of Appellants' Jurisdictional Statement.

[2] *Bloeth vs. State of New York*, 82 S. Ct. 661, 7 L.Ed. 2d 780; *Wilson vs. Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793, mandate conformed to 193 S.W. 2d 818; *Michel vs. State of Louisiana*, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83, rehearing denied, 350 U.S. 955, 76 S.Ct. 340, 100 L.Ed. 831; *Walters vs. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660; *Hanson vs. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283, rehearing denied, 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed. 2d 92, Opinion conformed 106 So. 2d 549.

[3] *Lynch vs. People of N.Y. ex rel Pierson*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191; *Wilson vs. Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793.

Question Number 2, which charges that Ordinance No. 6206 is in violation of the Fourteenth Amendment, because no provision was made for notice and public hearing, is clearly not set forth in the Notice of Appeal nor is it fairly comprised therein. However, even if it could be said that such question is preserved, the fact remains that annexation is legislative in nature and it has been held by this Court that the Federal Constitution does not require a hearing before or in connection with the exercise of a legislative determination.[1]

The manner in which Appellants have abandoned allegations of error which they have found to be ineffective and the manner in which they have developed new ones at the various stages of this case reminds one of the girl who refashions her gown with the advent of each new season until by the end of the year the original gown can no longer be recognized. As can be seen by the manner in which Appellants have attempted to add Question Number 2, it appears that they do not hesitate to take a few new stitches even in the presence of the Court.

Appellants' spirit in wanting to improve upon their case from stage to stage can not be criticized, but they are limited to the questions they have raised below. We refer to Appellants' efforts to raise the provisions of Article 1182a before this Court. In this connection, please see pages 15 & 16 of their Jurisdictional Statement and also pages 23, 28 & 29.

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[1] 16A C.J.S. Section 569(5) pages 580-81, note 20.

Of course, Article 1182a has nothing to do with the facts of this case, as we shall briefly demonstrate, but the point is that the record before this Court contains nothing to indicate that a failure to comply with this provision has ever been alleged below at any stage.

We have said that Article 1182a has nothing to do with the facts of this case and we shall demonstrate this. Such Article, by its own terms, applies only where "an election for the extension of the territorial limits" of a city is called and the same is to be submitted to the *legally qualified property tax paying voters.* (Italics added.) Now, the annexation election which was called by the City Council of the Appellee City was not limited to the legally qualified property tax paying voters, but rather was submitted to all qualified voters. In this connection, please see Ordinance No. 6206 and Article I, Section 2(a) of the City Charter. This distinction has already been recognized in this State in the case of *Turner vs. City of Beaumont,* (Civ.App. 1946, err. ref. n.r.e.) 197 S.W. 2d 114.

The foregoing demonstrates that Appellants' Fifth Point in the Court of Civil Appeals was too vague to raise properly a federal question, and that the questions presented to this Court were not timely raised in the Court below.

III. The Constitutionality of Neither Ordinance No. 6206 Nor No. 6242 Was Expressly Passed Upon By the Court Below. (Germane to Grounds for Dismissal E and F).

The Court of Civil Appeals did not expressly pass upon the constitutionality of either Ordinance No. 6206 or Ordinance No. 6242. In this connection, please see the Court's opinion beginning on page 32 of Appellants' Jurisdictional Statement, and also page 26 of such Statement, where Appellants concede that the State Courts did not expressly decide any issue concerning the constitutionality of such ordinances. As we have already shown in our brief under Arguments I & II, the Court of Civil Appeals was not called upon to decide such issues because the same were not properly framed and were not timely presented. See Rule 16(b) of this Court.

IV. The Questions Presented Are Not Substantial Federal Questions. (Germane to Grounds for Dismissal G).

Even if it could be said that Appellants have preserved their questions for consideration by this Court, the fact remains that they do not present substantial federal questions.

Questions Nos. 1 and 3 charge that the annexation in question is in violation of the Fourteenth Amendment because it was arbitrary, unreasonable and unjust. Question No. 2 clearly has no place before this Court because it was not included in the Notice of Appeal. Question No. 4 charges that the Appellee City failed to comply with its Charter and the laws of Texas in carrying out the annexation in question and that this is in violation of the Fourteenth Amendment.

The due process clause of the Fourteenth Amendment to the United States Constitution reads as follows:

> "Nor shall any State deprive any person of life, liberty, or property without due process of law."

Ordinarily, when a person brings an appeal to this Court under the foregoing clause of the Fourteenth Amendment, you would expect him to show that he owned property, or had a right, or that he was incarcerated by the State, or that he was under a death warrant, or that he was being or about to be deprived without due process of law of something which was within the protection of the due process clause. Well, it seems too incredible to be true, but Appellants in the record before this Court are not shown to be property owners within the area in question. They were sued as individuals and as representatives of a class of petitioners for incorporation of the City of Flour Bluff, and they filed their answer and cross-action in the same capacities. They have not even alleged in the pleadings that they are property owners. Nowhere in the record has any one of them testified that he owns as much as a parcel of land in the annexed area.

Now, Questions Numbers 1, 3 and 4 refer to deprivation of life, liberty or property, or, in some cases, to all three, but nowhere do Appellants indicate to this Court how the deprivation of life, liberty, or property will be brought about. To discover the "how" is simply left to the ingenuity of the Court.

Obviously, there are some landowners living in the area annexed by the Appellee City. Also, it is obvious that these landowners will be required to pay ad valorem taxes to the Appellee City. The difficulty with Appellants' case is, however, that none of the taxpayers is shown to be a party litigant and Appellants have no standing before this Court to invoke the due process clause of the Fourteenth Amendment on behalf of others. This Court has held that in order to entitle one to a review by the Supreme Court of the United States of a Judgment of a State Court one must show a personal interest.[1]

We will now discuss the two propositions raised; the first with reference to the reasonableness and the second with reference to the failure to comply with City Charter provisions. First, we will treat the proposition of reasonableness posed by Questions Numbers 1 and 3. Notice in Question Number 1 that Appellants represent themselves to be property owners. As we have stated, no support for this representation is found in the record. They claim that the taxing of "their property" without furnishing municipal services in return amounts to a deprivation of property without due process and a taking of property without just compensation.

Please notice that Appellants do not point to a finding of the Trial Court to the effect that the annexation in question was arbitrary, unreasonable

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[1] *Barrows vs. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, rehearing denied 346 U.S. 841, 74 S.Ct. 19, 98 L.Ed. 361; *Tileston vs. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603.

and unjust. Instead, Appellants point to a jury finding which they admit the Trial Judge disregarded. That the Trial Judge properly disregarded such jury finding is shown by the case of *State of Texas ex rel. Pan American Production Co. vs. Texas City.*[1] In that case, the Texas Supreme Court said at page 782:

> "This power of a home rule City to annex territory, being legislative power, is therefore not subject to being revised by the Judicial power of the courts."

Moreover, the Trial Judge acted properly in disregarding such jury finding, because the question of whether or not legislation is so unreasonable as to be void is a question of law for the Courts. Juries can decide fact questions only. In the case of legislation, the propriety is solely a question of law for the Court to decide, and if reasonable minds might differ as to its propriety, then it must be upheld as being within the legislative prerogative.

The Appellants have not even attempted to show how it is that they cannot receive any benefit from being annexed to the Appellee City. All of their evidence is based upon a certain viewpoint that a Mr. Gabe Lozano had with respect to whether or not a majority of the former City Council considered annexation wise when the petition for annexation was first filed with them on January 4, 1961.

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[1] 157 Tex. 450, 303 S.W.2d 780 (1957) appeal dismissed 355 U.S. 603 (1958).

This City Council left office in April, 1961 (S.F. p. 25). Ordinance No. 6206 calling for an election on the question of annexation was passed by the new City Council on July 12, 1961.[1]

The *Pan American Case*, supra, is very much in point with the case at bar. In that case, Texas City passed an ordinance annexing 3,500 acres of upland and some 2,000 acres of submerged land underlying two bodies of water, all immediately north of the existing city limes. A quo warranto proceeding was brought upon relation of Pan American Production Company and others, challenging the validity of the annexation ordinance insofar as it included submerged areas of Moses Lake and Dollar Bay. It was alleged that there were no inhabitants within the area in dispute and that the same was not suitable for habitation. In addition, there were numerous other allegations charging that the City had not good-faith intention of using such area for any municipal purpose, nor of furnishing to the area any City facilities or services. Specifically, it was alleged that the City sought to annex such area for the sole purpose of taxing relators' oil properties. The attack in question was grounded upon the Fourteenth Amendment to the United States Constitution as a deprivation of property without due process. Exceptions were leveled at such petition and upon hearing the Trial Court dismissed the case. The Court of Civil Appeals and the Supreme Court of Texas affirmed. Before the Supreme Court of the United States, on appeal, Appellee based its

[1] Jurisdictional Statement pp. 43-61.

Motion to Dismiss on the sole ground that the federal questions presented were not substantial. This Court dismissed the appeal.[1]

Please notice that the Pan American Case was never actually tried. Although the petition in that case contained extensive allegations, tending to support the Plaintiffs' position that the annexation was unreasonable as to them, the Trial Court dismissed the same as not stating a cause of action. Such dismissal was affirmed by the Court of Civil Appeals of Texas and by the Texas Supreme Court and this Court dismissed the appeal which was filed. In view of this, it would appear that the Courts agree that it is impossible to show that no benefits whatever flow to a given tract of land when it is annexed to a Home Rule City.

Appellants have never offered any proof showing they could not use fire and police protection such as Appellee City is able to provide, or that their area could not use sanitation services, street maintenance, traffic control, city planning, zoning, and all the other services a city of the size of Corpus Christi can provide.[2]

The very fact that the majority of the qualified voters favored separate incorporation of their area would seem to refute Appellants' contention that

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[1] *State ex rel. Pan American Production Co. vs. Texas City*, 157 Tex. 450, 303 S.W. 2d 780 (1957), appeal dismissed 355 U.S 603 (1958).

[2] U.S. Census for 1960 shows Corpus Christi with a population of 167,690.

the area could not receive any benefits from being attached to an organized municipal corporation.

Under Question Number 1 on page 6 of their Jurisdictional Statement, Appellants represent to this Court that Appellee City judicially admitted that the territory in question was unsuited for annexation to the Appellee City. In making such contention, Appellants simply indulge in deception. Appellants were attempting to incorporate a general law city, town or village. Under such circumstances, the State Legislature has provided that they can include "therein no territory except that which is intended to be used for strictly town purposes."[1] In making such allegations, we were attempting to show that Appellants had exceeded their statutory authority by including excessive territory. The authorities recognize that such provisions of Article 1134 are a delimiting factor in the case of general law cities, towns and villages.[2]

There is no such territorial limitation fixed by the Legislature on the power of a Home Rule City to annex. The only limitations applicable to a Home Rule City's power of annexation is that the territory shall be adjacent to the city and not included within the boundaries of any other municipality.[3]

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[1] Vernon's Ann. Civ. St. Article 1134, text can be found in Appendix.

[2] *Gray Production Co. vs. Christian*, (Civ. App. 1950), 231 S.W. 2d 901; and *State vs. City of Polytechnic*, (Civ. App. 1917), 197 S.W. 1136.

[3] *City of Houston vs. State ex rel. City of West University Place*, 142 Tex. 190, 176 S.W. 2d 928 (1943); and *State ex rel. Pan American Production Co. vs. Texas City*, 157 Tex. 450, 303 S.W. 2d (1957) appeal dismissed 355 U.S. 603 (1958).

Finally, the allegation that such territory is too extensive for incorporation into a town with a population of less than 5,000 does not amount to an admission that it is too extensive for annexation to a city already in existence, having a population of 167,690.

This Court has already determined, in the case of *Kelly vs. City of Pittsburgh*, 104 U.S. 78 (1881), that no question arises under the Constitution of the United States where property is annexed so long as some benefits are received by the territory involved. In that case this Court said at page 80:

> "It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation . . .
>
> ". . .
>
> "It is no part of our duty to inquire into the grounds on which those courts have so decided. *They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for* construing the Constitution of the United States."

And at page 82:

> "It may be true that he does not receive the same amount of benefit from some or any of

these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount . . .

"We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The waterworks will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools . . .

". . .

"Clearly, however, these are matters of detail within the discretion, and therefore the power, of the lawmaking body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law."

The *Kelly case* was again followed by this Court in deciding the case of *Forsyth vs. City of Hammond*, 166 U.S. 506 (1896). In that case the Plaintiff had attacked the right of the City to annex 725 acres of his agricultural land on the basis that no benefit could be received from being included in the City. In upholding such annexation, this Court expressly cited *Kelly vs. City of Pittsburgh*, and held that

the matter of city boundaries is a local question and that as a rule the legislative determination was final and absolute.

In deciding the *Kelly case*, this Court observed that Mr. Kelly was going to receive some benefits by virtue of the fact that he had been annexed to the City of Pittsburgh. Although the Court recognized that he would probably not receive the same amount of benefits from some or any of the city taxes as did citizens living in the heart of the City, the Court placed no importance upon the fact that his benefits would not be proportionate to the benefits received by others. It appears, therefore, that in order to defeat the annexation in question, someone having the status of a taxpayer in the annexed area would have to show that their land would receive no benefits by virtue of such annexation. As we have shown, Appellants are not shown to be taxpayers. Moreover, Appellants have not shown that the territory in question will not receive any benefits from the annexation. To the contrary, all the evidence shows that the territory in question had a particular need to be included within a municipal corporation.

The second and final proposition which Appellants have attempted to raise in this case concerns their allegations that the City of Corpus Christi has not complied with its Charter provision in connection with the annexation proceedings in question. The State Courts in the case at bar have upheld the validity of the annexation proceedings by the Ap-

pellee City. Therefore, the State Courts have determined that there has been sufficient compliance with the State Constitution, State Statutes and with the Charter of the City of Corpus Christi. Appellants allege that there has not been compliance with certain Charter provisions, but they wholly fail to demonstrate how such alleged irregularities have resulted in deprivation of life, liberty or property under the Fourteenth Amendment to the Constitution of the United States. Whether an ordinance is valid, and the extent to which it is so, under the Constitution and laws of a State, is not subject to review by the Supreme Court of the United States.[1]

V. The Judgment In This Case Rests On An Adequate Non-Federal Basis. (Germane to Ground for Dismissal H).

That the determination of this case rests upon a non-federal basis has, we submit, been demonstrated under each of the preceding Points substantiating the other seven grounds for dismissal. Appellants, as we have already shown, have wholly failed to show that they have properly raised a federal question in the Trial Court, and they have likewise failed to show that they have properly preserved a federal question in each of the Courts below. The record before this Court certainly fails to show in an affirmative manner that a federal question was presented to the highest State Court. In addition,

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[1] *Independent Warehouses vs. Scheele*, 331 U.S. 70, 67 S. Ct. 1062, 91 L.Ed. 1346; *Lombard vs. West Chicago Park Commissioners*, 81 U.S. 33, 21 S.Ct. 507, 45 L.Ed. 731.

Appellants have failed to show that the questions presented before this Court represent substantial federal questions. Because of Appellants' failure to preserve their record below, the Court of Civil Appeals, as well as the Supreme Court of Texas, were not called upon to decide a federal question. In view of the above, the decisions below must necessarily rest upon a non-federal basis.

On pages 11 and 12 of the Jurisdictional Statement, under the section referred to as the Statement, and on pages 15 through 23 of that section of the Jurisdictional Statement referred to as Argument, Appellants have attempted to show to this Court, as an original proposition, that the petition for annexation, which was filed with the City Council on January 4, 1961, was legally insufficient. This attempt on Appellants' part wholly ignores the rule of law, well-established in this State, that the finding of the City Council that the petition was in fact sufficient is, in the absence of a showing of bad faith on the Council's part, final and binding when called into question in a judicial proceeding.[1] Likewise Appellants' contention ignores the fact that a petition for annexation is not a jurisdictional prerequisite insofar as the power of the City Council to call an election on the question of annexation is involved.[2] The Corpus Christi City Charter recognizes that the City Council may on their own motion call an election on the question of annexation.

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[1] See the opinion of the Court of Civil Appeals at page 35 of the Jurisdictional Statement.

[2] See Section 2 of Article I of the Corpus Christi Charter, on page 5 of the Jurisdictional Statement.

On pages 17 and 18 of their Jurisdictional Statement, Appellants have attempted to show that the annexation in question was void because of the fact that some of the territory annexed consisted of highway, road, street, alley, sidewalks, parks, and other ground which was owned by a political subdivision or which had been dedicated to public use. This contention is absolutely without merit. Appellants are referring to Section 2(c) of Article I of the Corpus Christi City Charter which reads as follows:

> "(c) The City Council shall have the power by ordinance to annex additional territory abutting and lying adjacent to the City which constitutes or is used for roads, highways, streets, alleys, sidewalks, parks, or any other grounds which are owned by any political subdivision or which have been dedicated to a public use and not exceeding a distance of 200 feet from the City Limits as established by annexation by some other provision of this Charter."

The above quoted provision of the City Charter is obviously not a limitation upon the other two modes of annexation as set out in subsection (a) and (b). That this is true is made evident by a reading of the introductory portion of Section 2 of Article I. There it is said:

> "The City of Corpus Christi is empowered to annex additional territory adjoining or lying adjacent to the City in the manner set forth in either of the following sub-sections (a), (b), or (c)."

We see, therefore, that there are three separate and distinct modes of annexation provided by the City Charter.

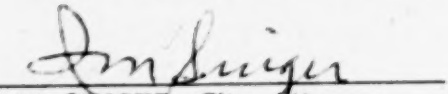
Based upon the foregoing, it is obvious that this case has been determined upon a non-federal basis and further, it is obvious that the State Courts have not attempted to evade a federal question because no federal question has ever been properly presented to them for consideration.

Conclusion

The City of Corpus Christi in the exercise of legislative power of annexation, in this instance exercised by the people themselves in an election, annexed certain territory. Each of the grounds for dismissal herein set forth by the Appellee are urged as sufficient grounds for dismissal of this attempted appeal from the Judgment of the State Court holding that the annexation was valid. Appellants' attempted appeal and grounds for jurisdiction in this case are so obviously without merit as to be easily recognized as a frivolous appeal. During all of the proceedings, the scanty references of the Appellants to any constitutional ground of defense to the validity of the annexation proceedings has been so veiled and general as to have been entirely ignored by each and all of the Courts through which the proceeding has passed and finally we find the grounds for jurisdiction to be vulnerable to a Motion for Dismissal on each of the eight grounds hereinabove set forth. It is obvious that the sole motive of the Appellants has been to delay the City in exercising municipal

authority over the territory annexed rather than to obtain protection of constitutional rights.

PREMISES CONSIDERED, for each of the grounds for dismissal hereinabove set forth, it is respectively submitted that the appeal should be dismissed.

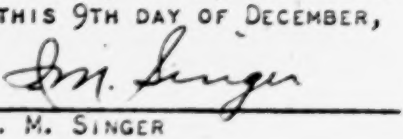


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SERVICE OF PROCESS

I, I. M. SINGER, A MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES, REPRESENTING THE APPELLEES HEREIN, DO HEREBY CERTIFY THAT THIS MOTION TO DISMISS HAS BEEN SERVED UPON APPELLANTS BY DEPOSITING A COPY THEREOF IN THE UNITED STATES MAIL IN CORPUS CHRISTI, TEXAS, WITH FIRST-CLASS POSTAGE PREPAID, ADDRESSED TO SIDNEY P. CHANDLER, P. O. BOX 6216, CORPUS CHRISTI, TEXAS, COUNSEL OF RECORD FOR APPELLANTS, THIS 9TH DAY OF DECEMBER, 1963.



I. M. SINGER

APPENDIX

ART. 1134. [1034] [580] [507] Mode of incorporation

If the inhabitants of such town or village desire to be so incorporated, at least twenty residents thereof, who would be qualified voters under the provi-

sions of this chapter, shall file an application for that purpose in the office of the county judge of the county in which the town or village, the name by which it is to be known when incorporated, and accompany the same with a plat of the proposed town or village including therein no territory except that which is intended to be used for strictly town purposes. If any town or village be situated on both sides of a line dividing two counties, application may be made to the county judge of either county in which a portion of said town or village is located, in manner and form as herein provided. A new election shall not be ordered in less than one year. Acts 1889, p. 5; G.L. vol. 9, 1033.